writing by the Chief Engineer of the Cable Company and the Manager, Distribution Engineering, of the Electric Company."[240]

141. ***Grandfathering.*** As stated above, grandfathering allows an attacher to adhere to a prior standard if a facility meets the engineering specification for the NESC edition in effect at the time of installation. Grandfathering is only necessary and appropriate where a prior standard is less stringent than a current standard. The Cable Operators' arguments regarding grandfathering, therefore, are largely academic given that the contract standards have not changed since their inception, and "grandfathered" attachments would be adhering to the same contract standards today as were in place 20 years ago.[241] More than 95% of violations cited do not meet the standards or exceptions of any version of the NESC, which is clearly impermissible.[242]][Complainants do not stipulate to this paragraph. As explained, *passim* in the Harrelson Report and Harrelson Reply Report, the significant majority of the violations Entergy cited do not constitute violations under a proper application of the NESC, including the grandfathering provision and all exceptions to general rules.]

142. EAI agreed, however, as an accommodation to encourage clean up of the Cable Operators' plant, to allow corrections to the standard of the

[240] EAI Pole Agreements at § 2.3(A) (Exh. 2A-2D).
[241] Buie Decl. Resp. Ex. 4 at ¶ 31; Bettis Decl. Resp. Ex. 3 at ¶ 8.
[242] Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.

NESC for violations identified during the safety inspections.[243] EAI further indicated that if the Complainants provided a certification from an Arkansas-licensed professional engineer ("P.E. certification") that an installation qualifies for grandfathering and is in compliance with the NESC edition that corresponds to the date of the facility's installation, EAI will accept the certification and consider such an installation compliant.[244] [Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section and at Section IV.D. above].

143. Grandfathering, however, is specific to the pole and the equipment in question, and requires evidence of the installation date of equipment and any significant upgrades or changes to the equipment in order to determine which version of the code applies (and whether the facility meets that standard).[245] EAI does not have information as to the age, installation date, or modification date of the Complainants' plant to gauge the application of grandfathering, and it is the Complainants who are in the best position to have this information.[246] The Cable Operators have not provided EAI with any evidence as to the age of their equipment or installations on a particular pole that would permit an evaluation as to whether that particular facility was attached in compliance with the version of the NESC applicable at the time of installation, nor has it provided a P.E.

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[243] Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.
[244] Kelley Decl. Resp. Ex. 11 at ¶¶ 6-9.
[245] NESC at 013; Buie Decl. Resp. Ex. 4 at ¶ 44.
[246] Buie Decl. Resp. Ex. 4 at ¶ 49; Tabor Decl. Resp. Ex. 17 at ¶¶ 13-14.

certification to this effect.[247] In any event, it should not be EAI's place to determine if grandfathering applies to Complainants' facilities; they should make that determination themselves and certify that to EAI. [Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section and at Section IV.D. above].

144. ***Exceptions.*** EAI is not required to limit its standards to the NESC or employ exceptions to NESC rules. In most instances, however, EAI's standards conform with the basic provisions of the NESC except that they do not employ complex and time-consuming calculations needed to make use of certain exceptions to the NESC.[248] Nevertheless, EAI agreed, as an accommodation to encourage clean up of the Cable Operators' plant, to allow corrections to the standard of the NESC for violations identified during the subject safety inspections and the use of exceptions. Where the Complainants provide a P.E.certification that an installation qualifies for an exception to the general NESC rule and is in compliance with the terms of that exception, EAI will accept the certification and consider such an installation compliant. Like grandfathering, however, such an evaluation requires a pole-specific analysis of whether an exception applies.[249] [Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section and at Section IV.D. above].

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[247] Resp. at ¶91; Buie Resp. Decl. Ex. 4 at 43-45; Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8..
[248] See, e.g., Buie Decl. Resp. Ex. 4 at ¶¶ 70-80.
[249] Buie Decl. Resp. Ex. 4 at ¶ 51.

145. Even if evaluating Complainants' plant under the NESC, there are still 41,215 violations for Comcast, 6,847 for Alliance, and 1,228 for WEHCO. This means that 96.3% of Comcast's violations, 94.7% of Alliance's violations, and 85.7% of WEHCO's violations would still be violations even assuming, *arguendo*, that they are entitled to be measured by the NESC and qualify for an NESC exception in every possible instance. These violations also do not meet the standards or exceptions to *any version* of the NESC that could possibly apply.[250] Complainants' arguments regarding exceptions, therefore, are largely academic and attempt to distract from the large scale problem and violation data that has not been refuted on the record.[251] [These sections are reproduced from above sections] [Complainants cannot stipulate to this paragraph for the reasons set forth in its disputed facts section and at Section IV.D. above].

3. Stipulated Points of Law

146. None.

4. Disputed Points of Law

a) Complainants

[250] Arnett Decl. Resp. Ex. 1 at ¶ 23; Tabor Decl. Resp. Ex. 17 at ¶ 20; Buie Decl. Resp. Ex. 4 at ¶¶ 29, 30, 48, 60, 86; Kelley Decl. Resp. Ex. 11 at ¶ 9.
[251] Arnett Decl. Resp. Ex. 1 at Attachment B.

147. EAI's refusal to apply the NESC's grandfathering provision is unjust and unreasonable.[252] [EAI cannot stipulate to this statement. EAI will permit grandfathering.[253]]

148. EAI's refusal to apply the NESC's grandfathering provision and exceptions to NESC general rules has no basis in safety, reliability or generally applicable engineering standards and is unjust and unreasonable.[254] [EAI cannot stipulate to this statement for the reason cited above.[255]]

149. In accordance with the terms of EAI's pole attachment agreements, it is unjust and unreasonable to make changes to supplement the requirements of the NESC with out obtaining mutual agreement and approved in writing by the Chief Engineer of the Cable Company.[256] [EAI cannot stipulate to this statement. EAI has not altered the contract terms or amended its engineering standards since the contracts were executed or assigned.[257]]

150. Because EAI does not have *bona fide* reasons of reliability or generally applicable engineering purposes to support its heightened

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[252] *Knology Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24618, ¶ 39 (2003).
[253] Buie Decl. Resp. Ex. 4 at ¶ 44; Kelley Decl. Resp. Ex. 11 at ¶¶ 6-8.
[254] 47 U.S.C. § 224.
[255] *See,* Section IV.B.2, *supra.*
[256] EAI Pole Agreements at § 2.3(A) (emphasis added) (Exh. 2A-2D).
[257] Bettis Decl. Resp. Ex. 3 at ¶ 8; Neumeier Decl. Resp. Ex. 14 at ¶ 8; Welch Decl. Resp. Ex. 19 at ¶ 6; Willems Decl. Resp. Ex. 20 at ¶ 8.

engineering standards they are unjust and unreasonable.[258] [EAI cannot stipulate to this statement for the reasons cited above.[259]]

b) EAI

151. EAI's position is the same as in the prior section on grandfathering and is as follows.

152. EAI is not required to employ the exceptions to the NESC. EAI has made a conscious decision, based on safety, reliability, and potential liability issues, to establish engineering standards that track the NESC in most regards but that do not employ exceptions that would be costly, time-consuming, or impractical to employ.[260] Where EAI has attempted to compromise with Complainants and allow use of the NESC and its exceptions rather than the contract standards for purposes of plant clean up, these exceptions to the general provisions of the NESC must be evaluated and applied in the field on a pole-specific basis.[261] Complainants have not demonstrated on the record that specific violations cited by USS fall under an exception to the NESC. [Complainants cannot stipulate to this paragraph for the reasons set forth *passim* in both Harrelson Declarations, in its disputed facts section and at Section IV.D. above].

153. FCC precedent rejects the attempt that Complainants are making to avoid liability by simply asserting that some/many of its facilities

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[258] *See* Record cites in disputed facts section above
[259] *See, e.g.*, Section IV.B.2, *supra.*
[260] Buie Decl. Resp. Ex. 4 at ¶ 19-29, 55-56, 63, 70-82, 84; Dagenhart Decl. Resp. Ex. 6 at ¶¶ 11-18.
[261] Buie Decl. Resp. Ex. 4 at ¶¶ 28, 43-44, 57, 85.

are grandfathered.[262] Under the NESC and *Knology*, grandfathering requires a specific showing that a particular attachment is entitled to grandfathering.[263] Complainants have not offered any evidence as to grandfathering for particular installations, but have only asserted that "many" of their installations are grandfathered. This is legally insufficient and provides no basis for EAI or the FCC to make a determination as to which of the thousands of violations meet the requirements of NESC 013.[264] Complainants have not carried their burden on the record to demonstrate that particular installations are entitled to grandfathered status. [Complainants cannot stipulate to this paragraph for the reasons set forth *passim* in both Harrelson Declarations, in its disputed facts section and at Section IV.D. above].

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[262] *Knology* at ¶39.
[263] Id.
[264] Resp. at ¶ 91; *Knology* at ¶ 39.

V. COSTS

A. Whether It Is Just and Reasonable for EAI Charge An Overhead Fee For Processing Contractor Invoices Based On The Facts Of This Case?

1. Stipulated Facts

154. EAI offered to have USS direct bill Complainants for USS' costs.[265] EAI initially included an overhead charge of 5% on these bills, which was increased in April 2004 to 8%.[266]

2. Disputed Facts

a) Cable Operators

155. Complainants currently pay EAI an annual pole attachment rental fee in order to attach to EAI's facilities.[267] [EAI cannot stipulate to this fact as it is misleading as to the rental fees paid. Complainants currently pay EAI an annual pole attachment rental fee in order to attach to EAI's *distribution* poles (as opposed to other EAI facilities).]

156. Overhead administrative costs such as processing billings are booked to FERC accounts and are included in the carrying component of the FCC formula and recovered through the annual rent.[268] [EAI cannot

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[265] Bettis Decl. Resp. Ex. 3 at ¶ 20; Inman Decl. Resp. Ex. 9 at ¶ 37; Billingsley Decl. ¶ 62; Hooks Decl. ¶ 18; Gould Decl. ¶ 18; Complaint Exhs 34 & 35.

[266] Bettis Decl. Resp. Ex. 3 at ¶ 20; Inman Decl. Resp. Ex. 9 at ¶ 37; Billingsley Decl. ¶ 62; Hooks Decl. ¶ 18; Gould Decl. ¶ 18.

[267] Declaration of Marc Billingsley at ¶ 6 (Exh. 6); Declaration of Bennett Hooks at ¶ 6 (Exh. 4); Declaration of Jeff Gould at ¶ 5 (Exh. 3); Declaration of Charlotte Dial at ¶ 4 (Exh. 5).

[268] 47 U.S.C. § 224; 47 C.F.R. § 1.1401 *et seq.*

stipulate to this statement. Costs associated with non-routine inspections are not recovered in the annual rental fees.[269]]

157. EAI's overhead costs are recovered in the general and administrative carrying component of the FCC formula and recovered through the annual rent.[270] [EAI cannot stipulate to this statement for the above-cited reason.]

158. Moreover, USS is EAI's contractor, not Complainants'. It is unreasonable for EAI to expect Complainants to accept and pay invoices for a contractor Complainants did not have any input in hiring and over whom Complainants have no oversight authority.[271] [EAI cannot stipulate to this statement. This was not pleaded, nor is it supported by citation.]

159. Finally, if USS' invoices were forwarded directly to Complainants, EAI would have been unable to subtract from USS' bills that portion of the inspection fees it claims to have allocated to itself and other attachers deriving a benefit from the inspection.[272] [EAI cannot stipulate to this statement. This was not pleaded, nor is it adequately supported by citation. In any event, any amounts direct billed from USS would have been a net amount that accounted for any portions of the costs for which EAI or another attacher was responsible.]

b) EAI

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[269] Inman Decl . Resp. Ex. 9 at ¶ 37.
[270] *See* 47 U.S.C. § 224.
[271] Gould Decl. ¶ 19, Hooks Decl. ¶ 16.
[272] *See* Response.

160. EAI does not recover the costs of processing USS' invoices, producing bills, or other activities related to the safety inspections from the annual rental rates for pole attachments.[273] This fee could have been avoided if Complainants had opted for direct billing from USS. The Complainants declined to be direct billed, and elected to have EAI process USS' bills. EAI initially included an overhead charge of 5% on these bills, which was increased in April 2004 to 8% on a company-wide basis for all EAI issued invoices.[274] Overhead fees of this nature are also standard in the industry, and the overhead fee was approved by the Arkansas Public Service Commission.[275] [Complainants cannot stipulate to this paragraph for the reasons set forth in its Disputed Facts section.]

3. Stipulated Points of Law

161. None.

4. Disputed Points of Law

a) Complainants

162. An administrative surcharge to Complainants' invoices, will cause EAI to double recover administrative expenses.[276] EAI may only

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[273] Inman Decl. Resp. Ex. 9 at ¶ 37.
[274] Inman Decl. Resp. Ex. 9 at ¶ 37.
[275] Resp. ¶ 155; Inman Decl. Resp. Ex. 9 at ¶ 37; Bettis Decl. Resp. Ex. 3 at ¶ 20.
[276] *See See Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 18 (Aug. 8, 2003), *recon. denied*, 18 FCC Rcd. 22287 (Oct. 29, 2003).

charge actual costs not already captured in the annual rate.[277] It is unjust and unreasonable for EAI to recover costs included in the annual rental rate.[278] It is therefore unjust and unreasonable for EAI to pass USS' invoices directly to Complainants for payment. [EAI cannot stipulate to any of the statements in this section for the reasons stated below. Moreover, EAI engaged USS through its standard procurement procedure at just and reasonable rates that were consistent with industry norms and consonant with the work to be done.[279] EAI would have also been justified in charging the entire amount to attachers for the safety inspection, as the inspection was necessitated by safety violations on their plant that were identified as a result of outage and trouble reports and confirmed in a test inspection.[280]]

163. EAI's double recovery notwithstanding, it is unjust and unreasonable for EAI to expect Complainants to accept and pay invoices for a contractor Complainants did not have any input in hiring and over whom Complainants have no oversight authority.

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[277] *See id.*; *Cavalier Tel., LLC v. Virginia Elec. & Power Co.*, 15 FCC Rcd. 9563, ¶ 22 (2000)

[278] *See Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 18 (Aug. 8, 2003), *recon. denied*, 18 FCC Rcd. 22287 (Oct. 29, 2003).

[279] Inman Decl. Resp. Ex. 9 at ¶ 12; Arnett Decl. Resp. Ex. 1 at Attachment A.

[280] *CTAG* at ¶ 15; *See also*, Inman Decl. Resp. Ex. 9 at ¶¶ 6-7, 13; Ex. 90-93; Ex. 94; Neumeier Decl. Resp. Ex. 14 at ¶ 18; Willems Decl. Resp. Ex. 20 at ¶ 11; Lovell Decl. Resp. Ex. 13 at ¶¶ 9-10; Bettis Decl. Resp. Ex. 3 at ¶ 13.

164. EAI's double recovery notwithstanding, it is unjust and unreasonable for EAI to forward USS' invoices directly to Complainants, because EAI is bound to ensure that USS' charges are just and reasonable.[281]

165. EAI's double recovery notwithstanding, it is unjust and unreasonable for EAI to forward USS' bills directly to Complainants for payment because EAI must subtract from USS' bills common costs allocated to all attachers deriving a benefit from the inspection and to specific attachers, including EAI, deriving a benefit from the inspection.[282]

b) EAI

166. EAI's overhead charge is just and reasonable under the facts of this case. EAI does not otherwise recover the costs associated with the billing activities that the Cable Operators affirmatively elected to have EAI perform and is not required to include costs for non-recurring safety inspections in its annual rental rates.[283] To do so would inappropriately shift the burden to other attachers and utility rate payers for an inspection that was necessitated by the acts of a single attacher. [Complainants cannot stipulate to this section for the reasons set forth in its Disputed law section above. Further, Complainants disagree that the inspection was necessitated by any one single Complainant or by all Complainants together.[284]]

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[281] *Cable Texas, Inc. v. EAI Servs., Inc.*, 14 FCC Rcd. 6647, ~~at~~ ¶ 14 (Cab. Serv. Bur. 1999).
[282] *Knology Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24618, ¶¶ 28-44 (2003).
[283] Inman Decl. Resp. Ex. 9 at ¶ 37.
[284] Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-

167. The Cable Operators have not denied that they were offered, and declined, direct billing for USS' invoices. The overhead charge is billed to all EAI invoices (not just those related to cable or pole attachment issues), and has been approved by the Arkansas Public Service Commission.[285] The amount EAI billed to Complainants excluded that portion of the costs that were attributable to EAI or a third party, and any direct billing would have been similarly reduced. Accordingly, the charges are just and reasonable. [Complainants cannot stipulate to this section for the reasons set forth in its Disputed Law section.]

B. Whether EAI May Recover Directly Inspection Costs More Than One Year After Installation

1. Stipulated Facts

168. Permitted inspections under Article V of the pole attachment agreements between EAI and each of the Cable Operators include initial inspection of new facilities, periodic inspections to determine compliance with construction standards and presence of unauthorized attachments, and complete inspections of facilities where violations of the agreement have been discovered.

12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

[285] Resp. ¶155; Inman Decl. Resp. Ex. 9 at ¶ 37; Bettis Decl. Resp. Ex. 3 at ¶ 20.

2. Disputed Facts

a) Complainants (all except Cox)

169. EAI's/USS' inspections were routine, periodic inspections, conducted on a rolling basis.[286] [EAI cannot stipulate to this statement. EAI's inspections were non-routine safety inspections based on outage and trouble reports, and the results of a test inspection.[287]] In most cases, USS' inspections occurred one year or more after the Complainants installed their facilities on EAI's poles.[288] [EAI cannot stipulate to this statement as worded. With the exception of Cox, most of the current inspections took place more than one year after the *initial* installation of Complainants' facilities. There have been considerable changes and work conducted on Complainants facilities since that time.[289]]

170. As a part of USS' survey, EAI collected a significant amount of information beneficial to itself.[290] In fact, EAI used this information to order corrections to its own and SBC's non-compliant facilities.[291] [EAI cannot stipulate to these statements. Any benefit derived on the part of EAI was

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[286] *See* Hooks Decl. ¶¶ 4-10; Dial Decl. ¶¶ 6-14; Billingsley Decl. ¶¶5-14.
[287] *CTAG* at ¶ 15; *See also*, Inman Decl. Resp. Ex. 9 at ¶¶ 6-7, 13; Ex. 90-93; Ex. 94; Neumeier Decl. Resp. Ex. 14 at ¶ 18; Willems Decl. Resp. Ex. 20 at ¶ 11; Lovell Decl. Resp. Ex. 13 at ¶¶ 9-10; Bettis Decl. Resp. Ex. 3 at ¶ 13.
[288] Hooks Decl. ¶¶ 4-10; Dial Decl. ¶¶ 6-14; Billingsley Decl. ¶¶5-14.
[289] *See, e.g.*, Tabor Decl. Resp. Ex. 17 at ¶¶ 6-16; Wagoner Decl. Resp. Ex. 18 at ¶ 40; Carpenter Decl. Resp. Ex. 5; Bettis Decl. Resp. Ex. 3 at ¶ 12; Harrell Decl. Resp. Ex. 8 at ¶¶ 16-20; Neumeier Decl. Resp. Ex. 14 at ¶¶ 13-14.
[290] *See* USS Work Codes (Compl. Exh. 30); Sample Worksheets (Compl. Exh. 31); Hooks Decl. ¶ 33 (Comp. Exh. 4); *See* Reply Sec. X.B.; Dial Reply Decl. ¶ 11; Billingsley Reply Decl. ¶ 64; Gould Reply Decl. ¶ 45; Response Exh. 94; Reply Exh. 6; Reply Exh. 6.
[291] Kelley Decl. ¶ 12; Response

incidental.[292] EAI would not have conducted the inspections but for the outage/trouble reports and the test inspection results.[293]]

b) EAI

171. EAI may charge for inspections taking place more than one year after installation.[294] The inspections conducted were not post-attachment or routine inspections. They were non-routine safety inspections prompted by (1) a significant number of cable-related outages and trouble reports; and (2) test inspection results illustrating significant non-compliant conditions and safety concerns on the Cable Operator's plant.[295] Article V of the pole attachment agreement permits the performance of such inspections at the violating attacher's cost. [Complainants has rebutted these facts in its Reply brief and cannot stipulate to them.[296] First, Complainants did not cause a significant number of outages and trouble calls.[297] Second, the test inspection

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[292] *See, e.g.*, Resp. ¶ 165; Arnett Decl. Resp. Ex. 1 at ¶¶ 7-9; Inman Decl. Resp. Ex. 9 at ¶¶13-16.
[293] Inman Decl. Resp. Ex. 9 at ¶ 7.
[294] *See,* Discussion of *Knology*, *infra.*
[295] Resp. at ¶34, 35; Inman Decl. Resp. Ex. 9 at ¶¶ 6-7, 13, 16; Outage and Trouble Reports, Resp. Exs. 90-93; *See also,* Ex. 94; Neumeier Decl. Resp. Ex. 14 at ¶ 18; Willems Decl. Resp. Ex. 20 at ¶ 11; Lovell Decl. Resp. Ex. 13 at ¶¶ 9-10; Bettis Decl. Resp. Ex. 3 at ¶ 13.
[296] Harrelson Reply Report ¶¶ 55-63.
[297] Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

results did not accurately identify non-compliant or unsafe conditions on Complainants' poles. Third, Complainants agree that Article V permits EAI to inspect its plant at anytime it pleases as often as it likes. However, Article V of the pole attachment agreement does not support charging the costs to Complainants under the facts of this case.]

172. The inspection was designed to gather only the minimal amount of information necessary to determine the engineering status and (non)compliance of the CATV attachments in question and to identify the necessary corrections.[298] Measurements were only done with respect to the cable attachments and the facilities immediately adjacent to them.[299] Maps generated and GPS coordinates are not compatible with EAI's mapping systems, but were necessary due to inadequate or non-existent cable operator maps and as a means for both parties to consistently identify and re-locate non-conforming poles for correction. Photographs, measurements and other data was used solely to identify violations and verify corrections.[300] [Complainants cannot stipulate to these facts. First, the survey collected a significant amount of information valuable to EAI.[301] Second, EAI used the

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[298] Resp. ¶ 40; Inman Decl. Resp. Ex. 9 at ¶¶ 15, 16; Wagoner Decl. Resp. Ex. 18 at ¶ 6; Arnett Decl. Resp. Ex. 1 at ¶¶ 7-8.
[299] Arnett Decl. Resp. Ex. 1 at ¶¶ 7-8; Inman Decl. Resp. Ex. 9 at ¶¶ 13-14, 19, 21; Wagoner Decl. Resp. Ex. 18 at ¶ 6.
[300] Arnett Decl. Resp. Ex. 1 at ¶ 18; Wagoner Decl. Resp. Ex. 18 at ¶¶ 7-10.
[301] Reply Exhibit 6; Billingsley Reply Decl. ¶¶ 64-65; Gould Reply Decl. ¶¶ 45-46; Response Exh. 1, ¶ 6; Reply Exhibit 8; Reply Exhibit 8.

information collected to order corrections to its own and to SBC's plant.[302] Third, Complainants have and have offered EAI the use of system maps that, in Cox's case, are more accurate and detailed than the maps USS generates.[303]]

c) Stipulated Points of Law

173. Costs unrelated to a particular company's attachments should be borne by all attachers.[304] The utility, however, "has the right to inspect its poles to ensure they are compliant with applicable safety standards." [305] It is not unreasonable to conduct inspections when the utility "discover[s] a safety violation during the previous regular inspection." [306] Nor is it unreasonable for the attacher that is responsible for the violation to bear the cost of such an inspection.[307]

174. The "cost of an inspection of pole attachments should be borne solely by the cable company, if and only if, cable attachments are the sole ones inspected and there is nothing in the inspection to benefit the utility or other attachers to the pole."[308]

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[302] *See, e.g.,* Declaration of Bennett Hooks at ¶ 33 (Compl. Exh. 4); Complaint Sec. IX.A.1.; USS Work Codes (Compl. Exh. 30); Sample Worksheets (Compl. Exh. 31); Dial Reply Decl. ¶¶11, 17-18; Billingsley Reply Decl. ¶ 64; Gould Reply Decl. ¶ 45; Kelley Decl. ¶ 12; Response.
[303] Billingsley Reply Decl. ¶ 31; Gould Reply Decl. ¶¶ 27, 44-45; Dial Reply Decl. ¶¶ 10-11; Hooks Decl. ¶ 24.
[304] *Knology Inc. v. Georgia Power Co.*, 18 FCC Rcd. 24618, ¶ 29 (2003).
[305] *CTAG* at ¶ 15.
[306] *CTAG* at ¶ 15.
[307] *CTAG* at ¶ 15.
[308] *Id.*

3. Disputed Points of Law

a) Complainants

175. Because EAI/USS conducted these inspections more than one year after the Complainants installed their facilities, they are considered routine inspections.[309] EAI recovers costs associated with routine inspections through its annual pole attachment rental rate.[310] EAI's attempt to recover these fees directly from Complainants as separate fees in addition to annual pole attachment rental rates is unjust, unreasonable and in violation of 47 U.S.C. § 224. [EAI cannot stipulate to these statements. Complainants have misconstrued *Knology,* which is limited and does not establish a blanket rule that all inspections performed more than one year after installation are routine.[311] The remaining statements are factually incorrect as cited above.[312]]

176. A pole owner that uses an inspection to collect information beneficial to itself must recover the costs through annual pole attachment fees.[313] "[C]osts attendant to routine inspections of poles, which benefit all attachers, should be included in the maintenance costs account and allocated

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309 *See KnologyInc. v. Georgia Power Co.*, 18 FCC Rcd 24615, at ¶¶ 28-35.
310 Complaint ¶ 315; 47 U.S.C. § 224; 47 C.F.R. § 1.1401 *et seq.*
311 *Knology* at ¶ 34. (emphasizing the inspection as a post-attachment inspection not related solely to cable attachments "based on the record in this case.")
312 *See. e.g.*, Section V.A.2, *supra.*
313 *See Cable Television Ass'n of Georgia v. Georgia Power Co.*, 18 FCC Rcd. 16333, ¶ 18 (Aug. 8, 2003), *recon. denied*, 18 FCC Rcd. 22287 (Oct. 29, 2003).

to each attacher in accordance with the Commission's formula."[314] Because EAI used the inspection information to order changes to its own and to SBC's plant, it is unjust and unreasonable to require Complainants to pay the inspection charges. [EAI cannot stipulate to these statements for the reasons stated below. This was not a routine inspection.]

b) EAI

177. *Knology* is limited to its facts and did not establish a blanket rule that costs for *any* inspection occurring more than one year after installation must be recovered in the annual rental fees. Utilities have the right to inspect poles to ensure compliance with safety standards,[315] and periodic and non-routine inspections outside of one year of installation are permitted.[316] They are not limited in time relative to installation. Inspections prompted by safety concerns identified during a test inspection are also reasonable.[317] Costs related to inspections that are occasioned by a single party should be borne by that party, regardless of when in time they take place relative to installation.[318] It is also reasonable for an attacher responsible for a safety violation to bear the cost of an inspection occasioned by the violation.[319] Requiring the responsible attacher to pay for inspection costs is therefore reasonable, and such costs may be billed on a one-time basis

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[314] *Id.*
[315] *CTAG* at ¶ 15.
[316] *Knology* at ¶ 34; *CTAG* at ¶ 15; *Newport News* at ¶ 10.
[317] *Newport News* at ¶ 10.
[318] Resp. at ¶¶ 36-40; *CTAG* at ¶¶ 15, 16; *Newport News* at ¶ 10.
[319] *CTAG* at ¶¶ 15, 16.

rather than through the annual rental fee. [Complainants cannot stipulate to these points of law. First, *Knology* stands for the proposition that routine inspections must be recovered through the annual rental rate. Further, it stands for the proposition that inspections conducted for more than one year after installations are routine inspections and are not related to particular attachments.[320] Second, Complainants deny that the inspections were prompted by or occasioned by safety concerns.[321]]

C. Is There Any Statutory Or Precedential Basis For The Proposed "Costing Models"?

1. Stipulated Points of Law

178. None.

2. Disputed Points of Law

a) Cable Operators

179. This question is not appropriate. The appropriate question is whether the "costing models" are just and reasonable. The FCC's determination of whether the costing models have statutory or precedential basis does not resolve the issue of whether they are just and reasonable.

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[320] *See Knology.*

[321] Summary pages, Response Exhs. 90-93; Billingsley Reply Decl. ¶¶ 6-16; Hooks Reply Decl. ¶¶ 5-12; Gould Reply Decl. ¶¶ 6-12; Allen Reply Decl. ¶¶ 4-12; Trouble Tickets 1023846013 and 1023846151, pages 1 and 2, Response Exhibit 91; Trouble Ticket 100009396, page 12, Tab 3, Volume 4, Response Exhibit 93; Trouble Ticket 1001045047, page 28, Tab 1, Volume 1, Response Exhibit 92; Outage Summary Charge, Reply p. 14; Trouble Ticket 1038412558, page 20, Tab 15, Volume 2, Response Exhibit 90; Trouble Ticket 1022516697, page 39, Tab one, Volume one, Response Exhibit 92; Harrelson Reply Report ¶¶ 12-15.

[EAI cannot stipulate to any statement in this section for the reasons cited below.]

180. Complainants do not derive a benefit from USS' services and therefore and should not be responsible for any inspection charges.[322] However, in an effort to compromise and offer the Commission a reasonable solution for allocating inspection charges, Complainants offer the Competitive Rate and Adjusted Shared Models.[323] As such, they are just and reasonable, in accordance with Section 224. [EAI cannot stipulate to this statement for the reasons cited below. First, Complainants have benefited from the safety inspections conducted, and are responsible for safety inspections necessitated by their safety violations.[324]. Second, if the "models" are employed by the FCC, "just and reasonable" is not the appropriate standard. Rather, such use must comport with the Administrative Procedure Act (APA), and cannot be arbitrary and capricious or an abuse of discretion. Lack of foundation in precedent, as well as the generally infirmities of the offered "models,"[325] would make use of such models by the FCC to be counter to the APA.]

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[322] *See, e.g.,* Declaration of Bennett Hooks at ¶ 33 (Compl. Exh. 4); Complaint Sec. IX.A.1.; USS Work Codes (Compl. Exh. 30); Sample Worksheets (Compl. Exh. 31); Dial Reply Decl. ¶¶11, 17-18; Billingsley Reply Decl. ¶ 64; Gould Reply Decl. ¶ 45.

[323] *See* Complaint Sec. IX.G.

[324] *CTAG* at ¶ 15.

[325] Arnett Decl. Resp. Ex. 1 at ¶¶ 40-45.

181. Neither Section 224 and 47 C.F.R. § 1.1401 *et seq.* require a statutory or precedential basis as a pre-requisite to the FCC determining that a rate, term, condition or remedy is just and reasonable.[326] [EAI cannot stipulate to this statement for the reason cited above and below.]

b) EAI

182. Complainants offer no basis in statute or in precedent for their suggested "costing models." The "competitive rate model" is based on a non-competitive bid supplied after the fact by a company with cable industry ties that would never be required to perform the work at the quoted price. There is no precedent for using the presumptions for average attaching entities in an inspection context.[327] The "adjusted share model" simply deducts component charges that the Complainants have not otherwise shown to be unreasonable.[328] Both, therefore, are unsupported in the law and should be rejected. [Complainants cannot stipulate to these points of law for the reasons set forth in its Disputed Points of Law section above].

D. Whether EAI Has Installed Electric Facilities Out Of Compliance With The NESC And Its Own Standards And If So, Whether It Is Reasonable For ACTA Members To Be Held Responsible For Costs Associated With Those Incorrect Electric Plant Installations That Create Safety Violations.

1. Stipulated Facts

183. None.

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[326] *See, e.g., Adoption of Rules for Regulation of Cable Television Pole Attachments,*

[327] Resp. at ¶¶ 162-165.

[328] Resp. at ¶¶ 166-169; Arnett Decl. Resp. Ex. 1 at ¶¶ 40-45.

2. Disputed Facts

a) *Complainants*

184. EAI installs its electric facilities out of compliance with the NESC and its own standards. It is unjust and unreasonable for Complainants to be held responsible for costs associated with correcting those conditions. [EAI cannot stipulate to these statements. EAI does not intentionally create safety violations on its poles. EAI can and does, however, have records of the age of EAI's equipment and the installation date on a particular pole.[329] EAI has always been willing to accept information from Complainants as to the relative age of the facilities on a pole in order to determine who has the obligation to correct a violation.[330] EAI has not required Complainants to correct or pay to correct a violation attributed to EAI.[331]]

185. EAI commonly adds street lights and outdoor lights to both EAI and telephone company poles in a manner that creates NESC violations.[332] [EAI cannot stipulate to this or any of the other paragraphs in this section for the reasons stated above.[333]]

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[329] Wagoner Decl. Resp. Ex. 18 at ¶¶ 20-24.
[330] Inman Decl. Resp. Ex. 9 at ¶¶ 35-36; Harrell Decl. Resp. Ex. 8 at ¶ 21.
[331] Inman Decl. Resp. Ex. 9 at ¶ 27; Kelley Decl. Resp. Ex. 11 at ¶ 12.
[332] Harrelson Report p. 24; (*See* Complaint Sec. VIII.C.); Harrelson Reply Report; Harrelson Reply Report pp. 32; Gould Reply Decl. ¶¶ 18, 22-24; Billingsley Reply Decl. ¶¶ 26-27.
[333] *See also*, Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application).

186. EAI frequently installs conduit or insulating in violation.[334] [EAI cannot stipulate to this or any of the other paragraphs in this section for the reasons stated above.[335]]

187. EAI commonly installs excessively long drip loops from transformers, secondary attachments on poles, and at outdoor lights, creating clearance violations with Complainants' facilities.[336] [EAI cannot stipulate to this or any of the other paragraphs in this section for the reasons stated above.[337]]

188. EAI cites Complainants for violations for conditions beyond Complainants' control.[338] [EAI cannot stipulate to this or any of the other paragraphs in this section for the reasons stated above.[339]]

189. EAI does not provide notice to Complainants when it builds down or encroaches on Complainants' facilities.[340] [EAI cannot stipulate to

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[334] Harrelson Report pp. 23-24; Harrelson Reply Report (*See* Sec. VIII.C.); Harrelson Reply Report.
[335] *See also,* Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application).
[336] Harrelson Report pp. 23-24 Harrelson Reply Report (*See* Sec. VIII.C.); Harrelson Reply Report.
[337] *See also,* Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application).
[338] Declaration of Jeff Gould at ¶ 36 (Compl. Exh. 3) (*See* Sec. VIII.C.); Harrelson Reply Report.
[339] *See also,* Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application); Harrell Decl. Resp. Ex. 8 at ¶ 28.
[340] Hooks Reply Decl. ¶ 21; Harrelson Reply Report.

this or any of the other paragraphs in this section for the reasons stated above.[341]]

190. EAI cites Complainants for violations when EAI builds down or encroaches on Complainants' facilities.[342] [EAI cannot stipulate to this or any of the other paragraphs in this section for the reasons stated above.[343]]

191. Despite the fact that either EAI creates these violations or Complainants are not responsible, USS nonetheless attributes the majority of the "violations" it finds to Complainants.[344] [EAI cannot stipulate to this or any of the other paragraphs in this section for the reasons stated above.[345]]

192. EAI continues to create new violations as Complainants are trying to make corrections. [EAI cannot stipulate to this or any of the other paragraphs in this section for the reasons stated above.[346]]

b) EAI

193. EAI objects to the manner in which this question is phrased. EAI has not required the Cable Operators to pay for the costs of remedying any violation identified on EAI's plant that is the responsibility of the electric utility or another attacher. EAI has already corrected violations allocated to

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341 *See also*, Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application).
342 Gould Decl. ¶ 39.(*See* Sec. VIII.C.); Harrelson Reply Report
343 *See also*, Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application).
344 Gould Decl. ¶¶ 32, 35-39; Hooks Decl. ¶¶ 22, 25-26; Gould Reply Decl. ¶ 23 (*See* Sec. VIII.C.); Harrelson Reply Report.
345 *See also*, Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application); Wagoner Decl. Resp. Ex. 18 at ¶¶ 20-27.
346 *See also*, Buie Decl. Resp. Ex. 4 at ¶¶ 43-86 (Rebutting Harrelson Report and incorrect NESC application).